IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket Nos. 24546, 24547, 24548, 24557, 24558, 24559

IN RE SRBA, CASE NO. 39576 - WILDERNESS RESERVED CLAIMS, CONSOLIDATED SUBCASE NO. 75-13605 AND HELLS CANYON NATIONAL RECREATION AREA CLAIMS, CONSOLIDATED SUBCASE NO. 79-13597.

POTLATCH CORPORATION, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, TWIN FALLS CANAL CO., NORTH SIDE CANAL CO., HARRISON CANAL CO., BURGESS CANAL & IRRIGATION, PEOPLES CANAL & IRRIGATION, PROGRESSIVE IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, NEW SWEDEN IRRIGATION DISTRICT, SNAKE RIVER VALLEY IRRIGATION DISTRICT, IDAHO IRRIGATION DISTRICT, EGIN BENCH CANAL, INC., NORTH FREMONT CANAL SYSTEMS, INC., STATE OF IDAHO, DAKOTA MINING CORPORATION, USMX, INC., DEWEY MINING COMPANY, THUNDER MOUNTAIN GOLD, INC., HECLA MINING COMPANY, CITY OF SALMON and CITY OF CHALLIS,

Appellants,

v.

UNITED STATES OF AMERICA,

Respondent.

Twin Falls, March 1999 Term

1999 Opinion No. 113

Filed: October 1, 1999

Frederick C. Lyon, Clerk

Appeal from the Snake River Basin Adjudication Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Daniel C. Hurlbutt, District Judge.
Appeal from the portion of the SRBA district court=s order granting the United States= motions for summary judgment on reserved water rights claims. Affirmed.

Givens Pursley, LLP, Boise, for appellants Potlatch Corporation, Dakota Mining Corporation, USMX, Dewey Mining Company, and Thunder Mountain Gold, Inc. Jeffrey C. Fereday argued.

Hon. Alan G. Lance, Attorney General; Clive Strong, Deputy Attorney General, Boise, for appellant State of Idaho. Clive Strong argued.

Root & Schindler, P.C., Denver, Colorado, for appellant Hecla Mining Company. Thomas Root argued.

Ling, Nielsen & Robinson, Rupert, for appellants A & B Irrigation District and Burley Irrigation District.

Rolsholt, Robertson & Tucker, Twin Falls, for appellants Twin Falls Canal Company and North Side Canal Company.

Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chtd., Rexburg, for appellants Harrison Canal Company, Burgess Canal & Irrigation, Peoples Canal & Irrigation, Progressive Irrigation District, Enterprise Irrigation District, New Sweden Irrigation District, Snake River Valley Irrigation District, Idaho Irrigation District, Egin Bench Canal, Inc., and North Fremont Canal Systems, Inc.

Beeman & Hofstetter, P.C., Boise; Mt. States Legal Foundation, Denver, for appellants City of Salmon and City of Challis.

Betty Richardson, United States Attorney, Boise; William B. Lazarus, Department of Justice, Washington, D.C., for respondent United States of America. William B. Lazarus argued.

SILAK, Justice.

This is an appeal from a Snake River Basin Adjudication (SRBA) district court decision that the United States holds reserved water rights to unappropriated flows in the Frank Church River of No Return,

Gospel-Hump, and Selway-Bitterroot Wilderness Areas, and the Hells Canyon National Recreation Area (HCNRA).

I.

FACTS AND PROCEDURAL BACKGROUND

In 1964, the United States Congress passed the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. '' 1131-1136), establishing a ANational Wilderness Preservation System@ to be composed of congressionally-designated wilderness areas. Since 1964, nearly four million acres within Idaho have been designated as wilderness under the system. This wilderness includes the Selway-Bitterroot Wilderness Area (designated in 1964), the Gospel-Hump Wilderness Area (designated in 1978), and the Frank Church River of No Return Wilderness Area (designated in 1980). The HCNRA was established in 1975 by the Hells Canyon National Recreation Area Act, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. '' 460gg(1)-(13)) (HCNRA Act).

In 1996, the United States filed claims[1] for reserved water rights in the Frank Church River of No Return, the Selway-Bitterroot, and the Gospel-Hump Wilderness Areas (Subcase No. 75-13605) based on the Wilderness Act. *See* 16 U.S.C. '' 1131-1136. The United States also claimed all the unappropriated flows originating in the HCNRA based on the HCNRA Act (Subcase No. 79-13597).[2] *See* 16 U.S.C. '' 460gg(1)-(13). Finally, the United States claimed reserved water rights in the Boise, Payette, Clearwater, Nez Perce, Sawtooth, and Salmon-Challis National Forests under the Multiple-Use Sustained-Yield Act (MUSYA) (Subcase No. 63-25239). *See* 16 U.S.C. '' 528-531.

In December of 1996, the United States, the State of Idaho and a number of other objectors filed cross-motions for summary judgment in Subcase No. 75-13605, seeking a determination of whether the Wilderness Act provides a basis for implying a federal reserved water right for the Frank Church River of No Return, the Gospel-Hump, and the Selway-Bitterroot Wilderness Areas (the Wilderness Areas). In February of 1997, the State of Idaho, Idaho Power, and the United States filed cross motions for summary

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[1] Wilderness Act Claims: 75-13605, 75-13606, 77-12774, 77-12775, 77-12776, 81-11191, 82-11120.

[2] HCNRA Claim: 79-13597.

judgment in Subcase No. 79-13597, seeking a determination whether the United States Forest Service is entitled to a federal reserved water right for the HCNRA. In February and March of 1997, the State of Idaho, the United States, and other interested parties filed cross-motions for summary judgment in Subcase No. 63-25239.

On December 18, 1997, the SRBA district court consolidated Subcase Nos. 75-13605 and 79-13597 with Subcase No. 63-25239, and issued an order granting and denying the United States' motions for summary judgment. The SRBA district court held that the United States was not entitled to reserved water rights in Subcase No. 63-25239 based on the MUSYA. However, the SRBA district court held that the United States is entitled to an implied reserved water right to all unappropriated water within the Frank Church River of No Return, the Gospel-Hump, and the Selway-Bitterroot Wilderness Areas based on the Wilderness Act. The SRBA district court further held that the HCNRA Act expressly reserved all unappropriated flows of water originating in tributaries to the Snake River within the HCNRA. The State of Idaho, the City of Challis, the City of Salmon, Potlatch Corporation and a number of other objectors appeal.[3]

II.

ISSUES ON APPEAL

The appellants present the following issues on appeal:

A. Whether the United States holds federal reserved water rights to unappropriated flows of water within the Frank Church River of No Return, the Selway-Bitterroot and the Gospel-Hump Wilderness Areas.

B. Whether the United States holds federal reserved water rights to all unappropriated flows of tributaries to the Snake River originating within the HCNRA.

III.

[3] The denial of the United States' claims for reserved water rights based on the MUSYA in Subcase No. 63-25239 is the subject of a separate appeal.

STANDARD OF REVIEW

In an appeal from an order granting summary judgment, we apply the same standard of review as that used by the district court when originally ruling on the motion. *See Mitchell v. Bingham Mem=l Hosp.*, 130 Idaho 420, 422, 942 P.2d 544, 546 (1997). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See id.* This determination is to be based on the Apleadings, depositions, and admissions on file, together with the affidavits, if any.@ *Id.* (quoting I.R.C.P. 56(c)). However, the Court should liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *See id.* The portions of the summary judgment that are the subject of this appeal present no factual disputes. Their resolution is purely a question of law.

IV.

ANALYSIS

A state generally has plenary control over water located within its boundaries. *See Kansas v. Colorado*, 206 U.S. 46, 86 (1907). However, a claim by the United States to a federal reserved water right is an exception to the state=s plenary authority over its water. *See Winters v. United States*, 207 U.S. 564, 577 (1908). The United States has broad powers to regulate navigable waters under the Commerce Clause and Article IV, ' 3 of the Constitution to reserve water rights for its reservations and its property. *See Arizona v. California*, 373 U.S. 546, 597-98 (1963). The United States Supreme Court has held:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Cappaert v. United States, 426 U.S. 128, 138 (1976).

Reserved water rights may be either express or implied. *See United States v. New Mexico*, 438 U.S. 696, 699-700 (1978). Where Congress does not expressly reserve water rights, an intent to reserve unappropriated water is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. *See Cappaert*, 426 U.S. at 139; *United States v. New*

Mexico, 438 U.S. at 700. However, where water is only valuable for a secondary use of the reservation, an inference arises that Congress intended that the United States would acquire water in the same manner as any other appropriator would within the state water appropriation scheme. *See United States v. New Mexico*, 438 U.S. at 702.

Thus, in order to determine whether the SRBA district court correctly held that the United States possesses federal reserved water rights in the Wilderness Areas and the HCNRA, it is necessary for this Court to consider 1) whether there has been a reservation of land, and, if so 2) whether the applicable acts of Congress contain an express reservation of water, and 3) if not, whether the applicable acts of Congress imply a reservation of water for the Wilderness Areas and/or the HCNRA. In determining whether an implied reservation exists, it must be determined whether Congress Aintended to reserve@ unappropriated water. *See Cappaert*, 426 U.S. at 139. An intent to reserve water will be inferred if water is necessary for the primary purposes of the reservation and if, without water, the purposes of the reservation will be entirely defeated. *See United States v. New Mexico*, 438 U.S. at 700. Finally, if a federal reserved water right is found to exist, the Court must ascertain whether the amount of water found subject to federal reservation by the SRBA district court in favor of the United States is necessary to achieve the purposes of the reservation. *See Cappaert*, 426 U.S. at 139. The claims of the United States under the Wilderness Act and the HCNRA Act will be analyzed accordingly.

A. The SRBA District Court Properly Inferred From The Wilderness Act Of 1964 A Congressional Intent To Reserve All Unappropriated Flows Within The Frank Church River Of No Return, The Selway-Bitterroot, And The Gospel-Hump Wilderness Areas.

The United States was granted summary judgment for seven reserved water right claims for all unappropriated flows in the Wilderness Areas. These claims are all based on the purposes of the Wilderness Act of 1964. 16 U.S.C. '' 1131-1136. The analysis must begin with an examination of the Wilderness Act, the acts establishing the Wilderness Areas, and the circumstances and history surrounding their designation, to determine whether federal reserved water rights exist for the Wilderness Areas.

Prior to passage of the Wilderness Act, national forest land was administered under the Organic Administration Act of 1897. 16 U.S.C. '' 473 *et seq*. Between 1929 and 1939, the Secretary of

Agriculture authorized the Chief of the National Forest Service to create Aprimitive,@ Awilderness,@ and Awild@ areas within the national forests. *See* H.R. Rep. No. 2521, 87th Cong., 2d Sess. 11 (1962). In 1960, Congress passed the Multiple-Use, Sustained-Yield Act (MUSYA), 16 U.S.C. '' 528 *et seq*., which directs that national forests be administered for numerous additional purposes, including wilderness purposes. Section 529 of the MUSYA states that A[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [this Act].@ 16 U.S.C. ' 529. Prior to passage of the Wilderness Act, wilderness purposes were protected in the national forests only as a matter of administration.

1. The purposes of the Wilderness Act of 1964.

In order to permanently protect wilderness areas by legislative action, Congress passed the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. '' 1131-1136), which recognized certain wilderness areas and provided for the designation of other areas where wilderness purposes would be elevated above all other preexisting purposes. Under the Wilderness Act, Congress intended to create a new category of land in which wilderness purposes would be the primary purpose of the areas and place Athe preservation of wilderness areas on a higher plane than any other use.@ H.R. Rep. No. 2521, 87th Cong., 2d Sess. 22 (1962).

Respondent argues that the plain language of the Wilderness Act reflects the intent of Congress to elevate wilderness purposes above all other purposes. Section 2(a) of the Wilderness Act provides:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as Awilderness areas,@ and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as Awilderness areas@ except as provided for in this Act or by a subsequent Act.

Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, ' 2(a) (1964) (codified at 16 U.S.C. '' 1131-1136).

Section 2**8** defines wilderness as an area Aretaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.@ Wilderness Act ' 2(c). Section 4(a) provides that A[t]he purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered.@ Wilderness Act ' 4(a). Section 4(b) provides that administering agencies Ashall be responsible for preserving the wilderness character of the area.@ Wilderness Act ' 4(b). Section 4(b) also provides that Awilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical uses.@ *Id.* These provisions make clear that any purpose previously authorized under the Organic Administration Act and MUSYA for national forests continues to exist in wilderness areas, but that those purposes must serve and further the overriding purpose of wilderness preservation.

2. Designation of the Wilderness Areas constitutes reservations of land for purposes of the federal reserved water rights doctrine.

A reservation for purposes of the federal reserved water rights doctrine requires that the land be withdrawn from the public domain by statute, executive order, or treaty, and that the land withdrawn be dedicated to a specific federal purpose. *See United States v. City and County of Denver*, 656 P.2d 1, 17-19 (Colo. 1983). The Wilderness Areas at issue were all designated pursuant to the Wilderness Act. The Selway-Bitterroot Wilderness Area was established through passage of the Wilderness Act itself in 1964. Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. '' 1131-1136). The Gospel-Hump Wilderness Area was designated under the Endangered American Wilderness Act of 1978. Pub. L. No. 95-237, 92 Stat. 43 (1978) (codified at 16 U.S.C. ' 1132). The Frank Church River of No Return Wilderness Area was established by the Central Idaho Wilderness Act of 1980. Pub. L. No. 96-312, 94 Stat. 948 (1980), and Pub. L. No. 98-231, 98 Stat. 60 (1984) (codified at 16 U.S.C. ' 1132).

Appellants advance several arguments contending that withdrawals under the Wilderness Act do not constitute reservations of land for purposes of the federal reserved water rights doctrine. Appellants first argue that section 4(a) of the Wilderness Act makes wilderness protection and preservation secondary

purposes of wilderness areas and thus do not support federal reserved water rights. Section 4(a) of the Wilderness Act provides that A[t]he purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests . . . are established.@ Wilderness Act ' 4(a). The appellants point out that the Supreme Court in *New Mexico* relied upon a similar provision in the MUSYA in finding that the provisions of the MUSYA did not broaden the purposes for which national forests had been established. *See* 438 U.S. at 713 (AWhile we conclude that the [MUSYA] was intended to broaden the purposes for which national forests had previously been administered, we agree that Congress did not intend to thereby expand the reserved rights of the United States.@).

However, the appellants= interpretation of section 4(a) cannot be reconciled with the clear language of the Wilderness Act. Respondent correctly points out that the Wilderness Act does not include the phrase Ain derogation of@ and is not worded as narrowly as the provision in the MUSYA. The national forest purpose of Aproviding a continuous supply of timber@ cannot remain a primary purpose of the Wilderness Act where the Act bars the use of wilderness areas for timber production. *See* Wilderness Act ' 4(c). Section 4(b) also sheds light on the meaning of section 4(a). Section 4(b) of the Wilderness Act states that A[e]xcept as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes which it may have been established as also to preserve its wilderness character.@ Wilderness Act ' 4(b). The SRBA district court correctly held that sections 4(a) and 4(b), when considered together, show that Congress intended wilderness preservation to be the primary purpose for Wilderness Areas, but that pre-existing purposes would continue to the extent they are consistent with preserving the wilderness character of the designated areas.

Appellants also argue that wilderness preservation cannot be considered a primary purpose because the Wilderness Act and the Central Idaho Wilderness Act do not limit the lands strictly to wilderness purposes. The appellants point out that mining claims valid as of December 31, 1983 (nineteen years after passage of the Wilderness Act) could continue to be developed and mined, and that grazing established prior to September 3, 1964 could also continue. *See* Wilderness Act '' 4(d)(3) and 4(d)(4). However, the SRBA district court properly found that these provisions merely aim to protect private

property rights affected by the establishment of the Wilderness Areas and are essentially grandfather clauses commonly included in land use legislation and regulations.

The appellants further argue that because the President of the United States is allowed to authorize power projects within the wilderness areas, *see* Wilderness Act ' 4(d)(4), that wilderness preservation cannot be a primary purpose of the Wilderness Act. However, this section only provides for the exercise of executive discretion to decide in the future whether the public interest may require the development of power projects. The SRBA district court correctly held that this provision does not amount to a relegation of wilderness preservation to a secondary purpose.

Finally, appellants argue that a reservation of land may occur only once, and that the use of the word Adesignation@ in the statutory language withdrawing the Wilderness Areas is insufficient to constitute a Areservation@ for purposes of the federal reserved water rights doctrine. However, whether a reservation of land takes place for purposes of a federal reserved water right does not turn on the particular words employed by Congress in withdrawing the land from the public domain. The SRBA district court correctly pointed out that the term Adesignation@ has been used to establish a wilderness area for which Congress has reserved water. *See* Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628 ' 101(a), 104 Stat. 4469 (codified at 16 U.S.C. ' 1132 (1990)) (designating wilderness area in Arizona pursuant to the Wilderness Act and reserving water for designated areas). The Aone time only reservation@ rule offered by the appellants has neither legal support nor historical precedent. The SRBA district court correctly held that Congress, under its constitutional mandate to manage federal lands, has the authority to re-reserve lands for changed purposes. *Cf. United States v. City and County of Denver*, 656 P.2d 1, 30-31 (Colo. 1982) (national forest land re-reserved as a national park); *Arizona v. California*, 373 U.S. 546, 601 (1963) (finding implied water rights in a recreation area previously reserved for a water project).

Through the Wilderness Act, Congress established a new category of federal lands--the National Wilderness Preservation System. Unlike the MUSYA, the Wilderness Act prescribes a unique management scheme that clearly aims to preserve the wilderness character of the designated lands. The designation of the Wilderness Areas at issue in this case continued the withdrawal of these areas from the public domain. Moreover, it is also clear that the Wilderness Areas were established for the purpose of

wilderness preservation. Therefore, we conclude that the congressional designations of the Wilderness Areas are reservations of land established for the primary purpose of wilderness protection and preservation.

3. The Wilderness Act neither expressly reserves nor disclaims federal water rights.

Having determined that the Wilderness Areas constitute reservations of land with the primary purpose of wilderness preservation, we next address whether the Wilderness Areas include express or implied reservations of water.

The United States does not suggest that the Wilderness Act contains an express reservation of water. However, the appellants maintain that the Wilderness Act does contain an express *disclaimer* of any federal reserved water rights. Section 4(d)(6)[4] of the Wilderness Act states that A[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from the State water laws.@ Wilderness Act ' 4(d)(6). The SRBA district court found Athat section 4(d)(6) is not intended to establish or disallow any express or implied water right under the Wilderness Act@ and that Athe language simply preserved the status quo between the states and federal government with respect to water rights.@ The appellants argue that section 4(d)(6) of the Wilderness Act is an express disclaimer of reserved water rights for the Wilderness Areas designated under the act.

The appellants argue that legislative history demonstrates that the section was intended to alleviate the concerns of western states that the Wilderness Act would form the basis for federal reserved water rights. The appellants read section 4(d)(6) as disclaiming any new or additional reserved water rights while not relinquishing any existing water rights. The appellants point to a statement by Senator Hubert Humphrey in 1958 with respect to what would become section 4(d)(6):

> Paragraph 5, the last in this section, contains language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change *existing* water laws and would *deprive* local communities of water, both domestic and irrigation. Although this was certainly not the intention of the

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[4] This section was originally enacted as section 4(d)(7). The Act of October 21, 1978, Pub. L. No. 95-495, 92 Stat. 1650 (1978), repealed former item (5) of section 4(d) and renumbered the remaining items.

> sponsors, it has seemed necessary to insert a short sentence to remove any doubts. The sentence added says: ANothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.@

104 Cong. Rec. 11,555 (1958) (emphasis added). Contrary to the assertion of appellants, this statement makes clear that the intention of the provision was to assure western representatives that no *then-existing* water rights would be affected. The concern of western representatives was that the establishment of the Wilderness Areas would deprive communities of existing water rights.

The plain language of section 4(d)(6) demonstrates that the section was not intended to either establish or disallow reserved water rights under the Wilderness Act. The SRBA district court thus correctly held that the language simply preserved the status quo between the states and federal government with respect to water rights and does not operate as an express disclaimer of federal reserved water rights.

4. Reserved water rights are implied by the Wilderness Act.

Since the Wilderness Act does not expressly reserve water rights to wilderness areas designated under the act, we must determine whether water rights may be implied. In determining whether an implied reservation exists, the Court must determine whether the Government Aintended to reserve@ unappropriated water. *See Cappaert*, 426 U.S. at 139. An intent to reserve water will be inferred if water is necessary for the primary purposes of the reservation. *See United States v. New Mexico*, 438 U.S. at 700. A federal reserved water right will be found if, without water, the purposes of the reservation will be entirely defeated. *See id.*

As discussed above, wilderness preservation is the primary purpose of the Wilderness Act. Whether the purposes of the Wilderness Act will be defeated without a reservation of water requires addressing the potential impact of the prior appropriation scheme on the purpose of wilderness protection and preservation. Idaho law provides that all non-reserved, unappropriated water within the state is subject to appropriation to further domestic and economic development. *See* Idaho Const. art. XV, ' 3 (citing domestic, agricultural, manufacturing, and mining purposes as beneficial uses of water). A review of the Wilderness Act demonstrates that the prior appropriation doctrine is inconsistent with congressional intent to preserve the wilderness character of the Wilderness Areas. Section 2**8** of the Wilderness Act provides the following definition of Awilderness@:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which . . . generally appears to have been affected primarily by the forces of nature, with the imprint of man=s work substantially unnoticeable.

Wilderness Act ' 2(c). Congress has established the Wilderness Areas under the premise that wilderness preservation is incompatible with human development. An application of the state prior appropriation regime to the Wilderness Areas would thus clearly defeat the congressional purpose of preserving the wilderness character of the Wilderness Areas. Therefore, we hold that the SRBA district court correctly concluded that Congress impliedly reserved water rights to Wilderness Areas designated under the Wilderness Act. Accordingly, we conclude that the SRBA district court correctly held that the priority dates for the implied reserved water rights correspond with the date each Wilderness Area was established.[5]

5. The minimum amount of water that must be reserved in order to fulfill the purposes of the wilderness reservations is all unappropriated water within each Wilderness Area.

Having determined that the United States holds federal reserved water rights for the Wilderness Areas, we must determine whether the amounts of water awarded by the SRBA district court in favor of the United States are necessary to achieve the purposes of the reservations. *See Cappaert*, 426 U.S. at 139. The SRBA district court held that the entire amount of unappropriated water constituting the natural flow in the Wilderness Areas is the minimum amount necessary to fulfill Congress=s intent to preserve and protect the Wilderness Areas.

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[5] Selway-Bitterroot Wilderness Area, September 3, 1964; Gospel-Hump Wilderness Area, February 24, 1978; Frank Church River of No Return Wilderness Area, July 23, 1980.

The appellants argue that the entire unappropriated flow is not necessary to fulfill the purposes of the reservations asserting that wilderness preservation purposes can still be accomplished while permitting the appropriation of water from within the Wilderness Areas. In *Cappaert*, the United States claimed a federal reserved water right to so much of underground waters appurtenant to Devil=s Hole, Death Valley National Monument, as might be necessary to maintain a pool and the endangered species of fish therein. Appellants cite *Cappaert* to support their contention that the SRBA district court erred by awarding the United States all unappropriated flows in the Wilderness Areas. Their argument in essence is that taking water from the Wilderness Areas does not impair their wilderness character and that the United States therefore is required to quantify the amount of water necessary for its reserved water right. The appellants argument fails to recognize that while *Cappaert* involved a claim for only as much water as was necessary for maintaining a pool of water to sustain an endangered species, the Wilderness Areas were designated by Congress to remain *unimpaired* with only a small number of specified exceptions.

As discussed above, the appropriation of water from within the Wilderness Areas would defeat Congress=s primary purpose of preserving the unimpaired wilderness character of the areas. The Wilderness Act makes clear Congress= intention that the Wilderness Areas Abe administered . . . in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for . . . the preservation of their wilderness character.@ Wilderness Act ' 2(a). Congress defined wilderness as Aan area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.@ ' 2(c). Water is required to effectuate the purpose of maintaining wilderness in its pristine natural condition. Because removing water necessarily impairs the natural state of the wilderness lands, Congress must have intended to reserve all unappropriated water. *Cf. Sierra Club v. Block*, 622 F. Supp. 842, 846 (D. Colo. 1985), *vacated on other grounds*, 911 F.2d 1405 (10th Cir. 1990). Therefore, we hold that the SRBA district court correctly concluded that the entire unappropriated amount of water within the Wilderness Areas is necessary to accomplish the purposes of wilderness preservation and protection.

Although the appellants correctly point out that the United States is generally required to quantify the amount of water claimed under the reservation doctrine pursuant to section 42-1409 of the Idaho Code,

this Court concluded in *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 577 P.2d 9 (1978), that a claim to the entire natural stream flow is permissible where it is proven that the entire natural flow is necessary to accomplish the purposes of the reservation:

> [T]he reason for requiring the United States to join in a general adjudication of water rights and to quantify its claims pursuant to state law is to insure certainty as to the validity and quantity of the water rights of the water users in the state. A claim to the entire natural flow, if it is necessary, cannot be faulted for uncertainty. Therefore, we conclude that since the nature and scope of reserved rights are determined by federal law . . . and because the fundamental requirement of certainty is adequately satisfied, a claim to the entire flow, *if it is proved to be necessary*, is a sufficient quantification of the reserved rights claimed . . . .

Id. at 40-41, 577 P.2d at 19-20 (citation omitted).

Finally, appellants argue that 16 U.S.C. ' 1133(d)(4), which authorizes the President to permit Aprospecting for water resources, the establishment and maintenance of reservoirs, [and] water-conservation works,@ would be rendered meaningless if the Wilderness Act is interpreted to have reserved all unappropriated water to the United States. The appellants also point to other authorized Anonconforming@ uses requiring water such as mining activity until 1983 and the authorization of mineral mining within a specific area of the Frank Church River of No Return Wilderness. *See* Wilderness Act ' 4(d)(3); Central Idaho Wilderness Act, Pub. L. No. 96-312, ' 5(d)(1), 94 Stat. 948 (1980). While the reserved water rights claims at issue here may indeed be subordinate to these authorized uses, the SRBA district court has not yet had occasion to rule upon any claims for such purposes. Consequently, it is not necessary for this Court to determine here the precise impact these uses have on the reserved water rights claims of the United States.

Accordingly, we hold that the United States is entitled to the entire amount of unappropriated waters constituting the natural flow in the Wilderness Areas and is not required to quantify in cubic feet per second or acre feet per year the precise amount since the entire amount is necessary to fulfill Congress=s intent to preserve and protect the unimpaired and natural character of the Wilderness Areas.

B. The SRBA District Court Did Not Err In Holding That The United States Holds A Federal Reserved Water Right For All

Unappropriated Flows Of Tributaries To The Snake River Originating Within The HCNRA.

The SRBA district court concluded that the United States holds a federal reserved water right to all unappropriated flows originating in tributaries located within the HCNRA with a priority date of December 31, 1975. For the reasons set forth below, we affirm the SRBA district court=s decision.

The HCNRA was established in 1975 by passage of the HCNRA Act, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. '' 460gg(1)-(13)). Appellants first argue that the HCNRA Act is merely a land management statute and hence does not constitute a reservation of land for purposes of the federal reserved water rights doctrine. As stated above, a land reservation is effected where land is withdrawn from the public domain and assigned a specific federal purpose. *See United States v. City and County of Denver*, 656 P.2d 1, 5 (Colo. 1982). The Alands and waters@ of what is now the HCNRA were withdrawn from the public domain by the HCNRA Act for the purpose of Aassur[ing] that the natural beauty, and historical and archeological values of the Hells Canyon area . . . are preserved for this and future generations, and that the recreational and ecologic values and public enjoyment of the area are thereby enhanced.@ HCNRA Act ' 1(a) (codified at 16 U.S.C. ' 460gg(a)). Thus, the designation of the HCNRA under the HCNRA Act constituted a reservation of land for purposes of the federal reserved water rights doctrine.

In addition to establishing a reservation of land, Congress expressly reserved water for the HCNRA. Section 1(b) of the HCNRA Act provides:

> The Hells Canyon National Recreation Area (hereinafter referred to as the Arecreation area@), which includes the Hells Canyon Wilderness (hereinafter referred to as the Awilderness@), the components of the Wild and Scenic Rivers System designated in section 3 of this Act, and the wilderness study areas designated in subsection 8(d) of this Act, *shall comprise the lands and waters* generally depicted on the map entitled AHells Canyon National Recreation Area@ dated September 1975, which shall be on file and available for public inspection in the office of the Chief, Forest Service, United States Department of Agriculture. The Secretary of Agriculture (hereinafter referred to as Athe Secretary@), shall, as soon as practicable, but no later than eighteen months after the date of enactment of this Act, publish a detailed boundary description of the recreation area, the wilderness study areas designated in subsection 8(d) of this Act, and the wilderness established in section 2 of this Act in the Federal Register.

HCNRA Act ' 1(b) (codified at 16 U.S.C. ' 460gg(b)) (emphasis added). Appellants contend that this section merely describes the boundaries of the HCNRA and cannot be used as a basis to infer an intent of Congress to reserve unappropriated flows of the tributaries within the HCNRA. However, the SRBA district court correctly concluded that this argument lacks merit. The plain language of this section of the HCNRA Act clearly states that the HCNRA is comprised of the land *and waters* within the area.

In reserving waters within the boundaries of the HCNRA, Congress exempted from the reservation the main stem of the Snake River and all tributaries upstream and downstream from the boundaries of the HCNRA. Section 6 of the HCNRA Act, as codified, provides:

> (a) No provision of the Wild and Scenic Rivers Act [16 U.S.C.A. ' 1271 *et seq.*], nor of this subchapter, nor any guidelines, rules, or regulations issued hereunder, shall in any way limit, restrict, or conflict with present and future use of *the waters of the Snake River and its tributaries upstream from the boundaries of the Hells Canyon National Recreation Area* created hereby, for beneficial uses, whether consumptive or nonconsumptive, now or hereafter existing, including, but not limited to, domestic, municipal, stockwater, irrigation, mining, power, or industrial uses.
>
> (b) No flow requirements of any kind may be imposed on the *waters of the Snake River below Hells Canyon Dam* under the provisions of the Wild and Scenic Rivers Act [16 U.S.C.A. ' 1271 *et seq.*], of this subchapter, or any guidelines, rules, or regulations adopted pursuant thereto.

16 U.S.C. ' 460gg-3(a) and (b) (originally enacted as HCNRA Act ' 6(a)-(b)) (emphasis added). Appellants argue that these provisions of the HCNRA Act operate as an express disclaimer of an intent to reserve water rights to any instream flow requirements for all tributaries of the Snake River, including those originating within the HCNRA. However, the SRBA district court correctly concluded that the disclaimer provisions contained in section 6 apply only to the main stem of the Snake River and do not include tributaries within the HCNRA.

The plain language of section 6(a) indeed disclaims federal reserved water rights to the waters of the Snake River and its tributaries, but it explicitly limits the reach of that disclaimer to the Snake River and tributaries Aupstream from the boundaries@ of the HCNRA. HCNRA Act ' 6(a). Similarly, section 6(b) disclaims a federal reserved water right to Athe waters of the Snake River below Hells Canyon Dam.@

HCNRA Act ' 6(b). It is thus clear that the disclaimer of water rights contained in section 6 of the HCNRA Act applies only to the main stem of the Snake River as well as all tributaries upstream and downstream of the designated areas. Nothing in the provisions cited by the appellants refers to tributaries of the Snake River located within the boundaries of the HCNRA. Therefore, we conclude that the HCNRA Act expressly reserved to the United States waters originating in tributaries to the Snake River which are located within the HCNRA.

The SRBA district court awarded the United States a reserved water right to Aall unappropriated flows of water originating in tributaries located within the HCNRA.@ Appellants argue that the SRBA district court erred by not limiting the award to Aonly that amount of water necessary to fulfill the purpose of the reservation, no more.@ *United States v. New Mexico*, 438 U.S. at 700. The purpose of the establishment of the HCNRA is set forth in section 1(a) of the HCNRA Act. That section states that the HCNRA was established:

> to assure that the natural beauty, and historical and archeological values of the Hells Canyon area and the seventy-one mile segment of the Snake River between Hells Canyon Dam and the Oregon-Washington border, together with portions of certain of its tributaries and adjacent lands, are preserved for this and future generations, and that the recreational and ecologic values and public enjoyment of the area are thereby enhanced.

HCNRA Act ' 1(a).

The appellants argue that all unappropriated water cannot be necessary to fulfill the purposes of the HCNRA since the HCNRA Act itself authorizes activities that are in conflict with strict wilderness preservation. However, because the SRBA district court correctly concluded that Congress expressly reserved all unappropriated flows of the tributaries of the Snake River within the HCNRA, there is no need to look to whether that amount is Anecessary@ within the implied reserved water rights analysis. *See United States v. New Mexico*, 438 U.S. at 700 (stating that under the *implied* reservation of water doctrine, Congress reserves Aonly that amount of water necessary to fulfill the purpose of the reservation@) (quoting *Cappaert*, 426 U.S. at 141). We conclude that the SRBA district court correctly held that the United States is entitled to all unappropriated flows of water originating in tributaries to the Snake River located within the HCNRA with a December 31, 1975, priority date.

V.

CONCLUSION

For all of the foregoing reasons, we affirm the SRBA district court=s order of December 18, 1997, granting the United States reserved water rights for the Frank Church River of No Return, the Selway-Bitterroot and the Gospel-Hump Wilderness Areas and the Hells Canyon National Recreation Area. No attorney fees are awarded on appeal. Costs are awarded to respondent.

Chief Justice TROUT and Justice WALTERS **CONCUR.**

Justice KIDWELL **DISSENTING**.

A judicial determination of additional federal water rights in Idaho is a far-reaching and historically significant decision. This Court is asked to create or recognize such rights by legal implication. No such authorization or language exists in the federal legislation under consideration. It is urged that Congress must have intended for such a federal water right to exist. However, the concept of federal implied water rights is not applicable where Congress explicitly disclaims water rights. Further, the U. S. Supreme Court has consistently held that even if a reservation of water rights exists, it is limited only to that amount of water necessary to keep the federal reserved purpose from failing.

Therefore, I respectfully dissent from the majority=s holding that the United States is entitled to all unappropriated flows of water within these congressionally created reservations without limitation. I believe the majority fails to appreciate the breadth of its holding and the unequivocal language of the disclaimers contained in the Wilderness Act and the Hells Canyon National Recreation Area Act (HCNRA).

Several important arguments in opposition to the creation of such federal implied water rights have been advanced. In the interest of brevity, I will discuss those arguments I have determined to be most persuasive.

A. The Wilderness Act.

The SRBA court decided that the United States was entitled to all unappropriated water within the Frank Church-River of No Return, Selway-Bitterroot, and Gospel-Hump Wilderness Areas because the Wilderness Act of 1964 included an implied reservation of water. However, the SRBA court erred in

applying the implied reservation of water doctrine where Congress was not silent as to water rights when it enacted the Wilderness Act.

The implied reservation of water rights concept is an often-cited canon of construction first articulated in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the United States Supreme Court held that a federal Indian reservation was entitled to an implied reserved water right because the purpose of the federal reservation, to convert the Indians to Aa pastoral and civilized people,@ would have been defeated without water. *Id*. at 576. The Court later expanded the concept of an implied reserved water right to cover other federal enclaves such as National Forests, National Recreation Areas, and National Wildlife Refuges. *See Arizona v. California*, 373 U.S. 546, 601 (1963).

Significant to the case at hand was the *Winters*= Court=s consideration that the implied reservation of water was Aa rule of interpretation.@ *Winters*, 207 U.S. at 576. In 1976, the Supreme Court, relying on *Arizona* and *Winters*, explained the rationale behind the implied federal reserved water right. The Court stated:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.

Cappaert v. United States, 426 U.S. 128 (1976).

This legalistic determination is employed *only* when the intent of Congress cannot be discerned from the clear language of the statute. This is not the case in the matter currently before this Court. Here Congress spoke explicitly.

Section 4(d)(7) of the Wilderness Act provides that A[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.@ Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, ' 4(d)(7) (1964) (codified at 16 U.S.C. ' 1133(d)(6)). This makes it clear that Congress was not silent concerning the issue of reserved water rights, and any application of the implied reservation of water doctrine would be improper.

A review of the congressional history surrounding this section reveals that there were two primary concerns which were addressed by the addition of section 4(d)(7). First, by adding the word Aclaim,@

Congress provided that federal agencies were not exempt from state water laws. Second, by adding Adenial,@ Congress legislated that no existing federal water rights would be changed by the act.

To alleviate concerns that the Wilderness Act would interfere with existing state water laws, the California Department of Water Resources recommended a disclaimer be added to the wilderness bill providing that Anothing in this act shall constitute an express or implied claim on the part of the United States for exemption from State water laws.@ 104 CONG. REC. 6344 (1958).

In response to California=s recommendation, the Department of Justice suggested the bill include the words Aor denial@ to ensure that none of the then-existing federal water rights would be affected by the passage of the bill. Senator James Murray of Montana stated that A[i]t has been made clear that nothing in the legislation may be construed to modify existing water law.@ 104 CONG. REC. 11,557 (1958).

When section 4(d)(7) was finally enacted by the 88th Congress, it contained both the phrase ANothing in this Act shall constitute an express or implied claim or denial.@ Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, ' 4(d)(7) (1964) (codified at 16 U.S.C. ' 1133(d)(6)). This was also the same language used by Idaho=s Senator Frank Church of Idaho in drafting the Central Idaho Wilderness Act. In an attempt to alleviate fears over federal control of state water, Senator Church emphasized,

> To underscore the jurisdiction of the State of Idaho over the water resources and fish and game within the wilderness areas, the provisions of the 1964 act which relate to these issues are also repeated.

126 CONG. REC. 17,180 (1980).

It is important that section 4(d)(7) should be interpreted for what it was intended Ba congressional disclaimer to any exemption from state water laws, and to any federal water rights not then in existence, either implied or express.

By finding the section to be ambiguous, the SRBA court ignored the very section that was intended to protect the waters in the wilderness areas from future federal appropriation, absent requirements that the federal government adhere to state water laws.

The SRBA court interpreted section 4(d)(7) to say that Congress intended to simply maintain the *status quo*, rather than to disclaim any reservation of water. However, if this is the correct interpretation, then there is no need for the courts to imply a federal reserved water right. The federal implied water right

doctrine is only intended to be used, or applicable, where Congress is silent on the issue of water. Here, Congress was far from silent Bit specifically took up the issue and chose not to reserve water rights beyond those which existed at the time. It is improper for this Court, and the SRBA court, to employ a canon of legal construction to create congressional intention when Congress has clearly stated its position.

In addition to misinterpreting congressional intent in section 4(d)(7), the SRBA court also was incorrect in finding that an implied reservation of water is necessary to achieve the purposes of the Wilderness Act. Section 4(a) of the Wilderness Act states, AThe purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered . . . .@ *Id.* (codified at 16 U.S.C. ' 1133(a)).

The United States Supreme Court has held that supplemental purposes are not sufficient to imply a federal reserved water right. *United States v. New Mexico*, 438 U.S. 696, 702 (1978). In *New Mexico*, the Court determined that while the purpose of the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. '' 528, Awas intended to broaden the purposes for which national forests had previously been administered,@ ACongress did not intend to thereby expand the reserved rights of the United States.@ *New Mexico*, 438 U.S. at 713. The Court relied on section 1 of MUSYA which provides:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes . . . are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

16 U.S.C. ' 528.

In holding that ACongress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the *secondary* purposes there established,@ the Court relied upon the plain and clear language of the MUSYA statute. *New Mexico*, 438 U.S. at 715. Justice Rehnquist, writing for the majority, concluded that even though Congress intended to broaden the purposes of the national forests, by characterizing the purposes as supplemental Congress did not Abelieve[] the new purposes to be so crucial as to require a reservation of additional water.@ *Id.* at 715.

The holding in *New Mexico* is directly on point with the interpretation of the Wilderness Act in the present case. In enacting the Wilderness Act, Congress stated that the Wilderness Act=s purposes Aare

hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered.@ 16 U.S.C. ' 1133(a). When read in connection with the Wilderness Act, legislative history makes it clear that the Wilderness Act was patterned after the Multiple-Use Sustained-Yield Act.

The Wilderness Act provides that A[n]othing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the [original Act] and the Multiple-Use Sustained-Yield Act . . . @ 16 U.S.C. 1133(a)(1). Since congressional intent is clear that the purposes of the Wilderness Act are to be supplemental and secondary to the purposes of the national forests, and since secondary purposes are not enough for an implied federal reserved water right, the SRBA court was incorrect in holding to the contrary.

In reaching the conclusion that Congress intended to reserve all unappropriated waters, the SRBA court distinguished *New Mexico* and MUSYA from the Wilderness Act. The SRBA court reasoned that *New Mexico* involved preexisting reservations, whereas the Wilderness Act was a re-reservation of lands with a new primary purpose. However, this distinction is erroneous. This is particularly clear when considering the history of the Wilderness Act.

The Wilderness Act was designed to protect the wilderness character of areas Athat are already in Federal ownership or control and are already within parks, forests, refuges, or reservations.@ 102 CONG. REC. 9772 (1956). Senator Hubert Humphrey introduced S. 1176, the Wilderness Act=s predecessor, by noting:

> Every area included in this System is now serving some other purpose, or purposes, consistent with the continued protection of the area as wilderness. Under this legislation these areas will continue to serve theses purposes, and they will be administered by the same agencies that now handle them.

103 CONG. REC. 1894 (1957).

Therefore, the SRBA court erred in concluding that the Wilderness Act was a reservation, since it was in fact, only a redesignation of currently managed federal land. Thus, *New Mexico* is controlling and should not have been distinguished.

However, even if the SRBA court was correct in finding that Congress had impliedly reserved water rights, it erred in the amount of water it found to be impliedly reserved under the Wilderness Act.

The SRBA court held that all unappropriated flows of water within the designated wilderness areas were reserved as the Aminimum amount necessary to fulfill Congress=s intent to preserve and protect the wilderness areas.@ I find nothing in state or federal law to support this conclusion.

Both the U. S. Supreme Court and this Court have set forth the test for determining the amount of water reserved under the implied reservation of water doctrine. The United States Supreme Court succinctly explained:

> While many of the contours of what has come to be called the Aimplied-reservation-of-water doctrine@ remain unspecified, the Court has repeatedly emphasized that Congress reserved Aonly that amount of water necessary to fulfill the purpose of the reservation, no more.@ [Citations omitted.] Each time this Court has applied the Aimplied-reservation-of-water doctrine,@ it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

New Mexico, 438 U.S. at 700. *See also Cappaert*, 426 U.S. at 139 (AIntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.@).

Likewise, this Court has ruled:

> Water which merely contributes to or is helpful in achieving these purposes but the absence of which would not frustrate their accomplishment does not satisfy the test. A strict standard of necessity must be applied in these cases. . . .

Avondale Irrigation Dist. v. North Idaho Prop., Inc., 99 Idaho 30, 41, 577 P.2d 9, 20 (1978).

When determining the amount of water to be awarded to the United States, the SRBA court found the issue to be the same as that in *Avondale*, Awhether the United States may reserve all unappropriated natural flows without specific quantification of the reserved right.@ However, the SRBA court prematurely reached this issue because it failed to determine the minimum amount of water necessary to Afulfill the purpose of the reservation.@ *New Mexico*, 438 U.S. at 700. The SRBA court failed to Acarefully examine@ the purpose of the reservation to determine how much water was necessary.

Instead, the SRBA court relied on *Avondale=s* holding that A[a] claim to the entire flow, if it is necessary, cannot be faulted for uncertainty.@ *Avondale*, 99 Idaho at 40, 577 P.2d at 19. The SRBA court failed to appreciate the significance of the *Avondale* holding, in that the Idaho Supreme Court granted the United States a water right of all unappropriated water only after it had decided that Athe United States

[must] prove that a right to the entire natural flow is in fact necessary to accomplish the limited purposes for which the [reservation] was established.@ *Id.*

In the present case, the SRBA court failed to set forth specific findings that the United States had met its burden; rather, it summarily concluded that A[a]ppropriation of water [by anyone other than the United States] within the wilderness areas would defeat Congress=s primary purpose of preserving wilderness character.@[6] Thus, because the SRBA court failed to establish that the entire unappropriated flow within these areas was required to avoid defeating the purpose of the Act, it should not be affirmed.

B. Hells Canyon National Recreation Area.

Since the HCNRA lies both in Idaho and Oregon, our singular determination of this matter raises several interesting and potentially awkward legal issues. However, because the matter arose pursuant to the Snake River Basin Adjudication we have not been presented with these issues.

The SRBA court ruled that A[A]ll unappropriated flows originating in tributaries located within the Hells Canyon National Recreation Area are reserved for the United States with a December 31, 1975, priority date. No water in the main stem of the Snake River below Hells Canyon Dam is reserved.@

The SRBA court reached its holding by construing language in section 1(b) of the HCNRA Act, that the recreation area Ashall comprise the lands and waters@ of the HCNRA. HCNRA Act, Pub. L. No. 94-199, 89 Stat. 1117, ' 1(b) (codified as amended at 16 U.S.C. ' 460gg(b)). The SRBA court concluded that this language was an express reservation of all waters within the HCNRA. The SRBA court then limited its holding by concluding that the language in sections 6(a) (ANo provision . . . of this Act . . .

[6] When the SRBA court held that the United States was entitled to all unappropriated flows in order to prevent the defeat the purpose of the Wilderness Act, it overlooked the fact that Congress has expressly authorized certain nonconforming uses within wilderness areas. The United States Attorney conceded to the SRBA court that section 4(d)(4) allows the President to approve water development within these areas.

shall in any way limit, restrict, or conflict with present and future use of the waters of the Snake River and its tributaries upstream from the boundaries of the [HCNRA] . . . .@) and (b) (No flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon Dam under the provisions . . . of this Act . . . .@) merely created an exception for waters within the main stem of the Snake River from the express reservation of all other waters within the Act. I respectfully, but strenuously, point out that the wording of these sections do not support this analysis.

It is clear on the face of section 1(b) that the description of lands and waters contained therein are only for the purpose of describing the boundaries of the area; it is only necessary to consider congressional intent to resolve any doubt. In S. Rep. No. 94-153 (1975), Congress confirmed that A[s]ection 1(b) describes the *boundaries* of the Hells Canyon National Recreation Area, including Hells Canyon Wilderness Areas, components to the Wild and Scenic River System, and certain wilderness study areas, located in the State of Oregon.@ *Id*. at 3 (emphasis added).

However, it appears that Congress did intend that part of the Snake River, Atogether with portions of certain of its tributaries and adjacent lands,@ be held in a National Recreation Area to Aassure that the natural beauty, and historical and archeological values@ would be preserved Afor this and future generations.@ 16 U.S.C. ' 460gg(a).

Therefore, the wording suggests that Congress did intend, as the SRBA court held, that the waters of the tributaries to the Snake River which originate within the boundaries of the HCNRA be reserved to the United States. However, it is critical to note that this express reservation is severely limited, both by the HCNRA Act itself and by case law of the U.S. Supreme Court.

As discussed earlier, the Supreme Court has held that when a federal statute expressly reserves water without quantifying a specific amount, it will award Aonly that amount of water necessary to fulfill the purpose of the reservation, no more.@ *See Cappaert*, 426 U.S. at 140 (citing *Arizona*, 373 U.S. at 600-01).

Although the Supreme Court reviewed the history of the implied-reservation-of-water-rights doctrine, it nonetheless determined that the proclamation which created the Devil=s Hole National Monument contained an *express* reservation of water. *See Cappaert*, 426 U.S. at 139. Even though it

found an express reservation of water, the Supreme Court applied the reasoning of the implied-reservation-of-water-rights doctrine where the express reservation of water was silent as to the amount reserved. *Id*. at 141.

Applying the implied-reservation-of-water-rights doctrine to the expressed reservation in the proclamation, the Supreme Court ruled that the United States was entitled to a sufficient amount of water necessary to preserve the purpose of the reservation. *Id*. at 140. To determine the purpose of the reservation, the Court noted that the AProclamation must be read in its entirety.@ *Id*.

Likewise, the HCNRA Act must be read in its entirety so that the purpose for the reservation may be fully understood. Once the purpose is sufficiently established, I would suggest that this Court then remand to the SRBA court to make the factual determination as to the minimum amount necessary needed to fulfill the purpose of the Act.

The HCNRA Act set out that the purpose of the Act:

> To assure that the natural beauty, and historical and archeological values of the Hells Canyon area and the seventy-one-mile segment of the Snake River between Hells Canyon Dam and the Oregon-Washington border, together with portions of certain of its tributaries and adjacent lands, are preserved for this and future generations, and that the recreational and ecologic values and public enjoyment of the area are thereby enhanced, there is hereby established the Hells Canyon National Recreation Area.

16 U.S.C. ' 460gg(a).

In addition to carefully setting forth the purpose of the reservation, the HCNRA Act also provides some objectives which can be used to construe congressional intent. Section 7(1) of the Act provides that one of the objectives of the recreation area is to provide Athe maintenance and protection of the free-flowing nature of the rivers within the recreation area[.]@ 16 U.S.C. ' 460gg-4(1). Section 7 also provides that a management objective is the Aprotection and maintenance of fish and wildlife habitat[.]@ 16 U.S.C ' 460gg-4(4).

Such non-consumptive uses are consistent with the protections built into the Act by its framers. Section 6 of the Act provides that:

> (a) No provision of the Wild and Scenic Rivers Act (82 Stat. 906), nor of this Act, nor any guidelines, rules, or regulations issued hereunder, shall in any way limit, restrict, or conflict with present and future use of the waters of the Snake River and its tributaries upstream

> from the boundaries of the Hells Canyon National Recreation Area created hereby, for beneficial uses, whether consumptive or nonconsumptive, now or hereafter existing, including, but not limited to, domestic, municipal, stockwater, irrigation, mining, power, or industrial uses.
> (b) No flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon Dam under the provisions of the Wild and Scenic Rivers Act (82 Stat. 906), of this Act, or any guidelines, rules, or regulations adopted pursuant thereto.

16 U.S.C. ' 460gg-3.

Senator Church explained the purpose of sections 6(a) and (b):

> A reading of this language, which was supplied, incidentally, by the counsel for the Idaho Water Users Association, should make it evident that every possible protection has been given [that] statutory language can confer on the upstream water users, not only with respect to existing water rights but with respect to future diversions as well.
>
> Furthermore, the language makes it equally clear that no flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon DamBthat is to say, in the area covered by the bill, as a consequence of the enactment of this legislation. So we have undertaken to protect upstream water users in every way possible.
>
> I think it can be said accurately that this bill extends protection to upstream water users as completely as it can be done in statutory form.

120 CONG. REC. 32,768 (1974).

Senator James McClure of Idaho reiterated the intent to protect future water rights on the Snake River, explaining that:

> Section 6(a) of the bill provides for no conflict between this act and the present and future rights of the water users upstream in the State of Idaho. Section 6(b) prohibits the establishment of any minimum flow requirements through that portion of the Snake River included within the wild and scenic rivers system. No Federal law now on the books guarantees upstream water rights, let alone future use. Neither is there any present law that prohibits flow requirements. In each of these areas, this protective language adds safeguards that do not now exist and, in my opinion, the net effect of the bill poses no threat to upstream water rights.

121 CONG. REC. 16,314 (1975).

Put simply, it is clear that Congress intended to reserve necessary water for the HCNRA. However this reservation is limited by the Act itself and prior legal cases. These limitations provide that the water from the tributaries of the Snake River within the HCNRA are reserved to the amount necessary to carry out the purpose of the reservation. The purpose of the reservation, as plainly stated in the Act, is

consonant with the nonconsumptive limitations contained in sections 6(a) and (b). These limitations clearly set forth that the upstream and downstream water users are to be protected in present and future water rights.

It should be emphasized, in conclusion that the use of the reserved water in the HCNRA, for the purpose of the reservation, must be limited to use within the boundaries of the reservation.

Therefore, I would affirm the SRBA court=s holding only to the point that it held the United States is entitled to a water right for the waters of the tributaries of the Snake River which originate within the HCNRA. However, I would remand to allow the SRBA court to clarify the limitations on use of the above water right.

I conclude then, that the SRBA court erred when it held that the United States is entitled to a reserved implied water right, because Congress was not silent on the issue of water in constructing the Act. The SRBA court then compounded this mistake by holding that the entire flows within these areas were reserved to the United States. The SRBA court should have determined the minimum amount necessary to avoid defeating the purpose of the Act. Additionally, I believe the SRBA court erred when it held that the United States is entitled to all waters originating in the tributaries of the Snake River within the HCNRA without any strict limitations. For these reasons I would reverse and remand the decision of the SRBA court.

Justice SCHROEDER **DISSENTING**.

I join in Justice Kidwell=s dissent and write separately to emphasize the effect of the Court=s ruling which precludes the appropriation of water upstream, outside the wilderness, and invalidates any appropriation that has taken place since 1964 and the dates of subsequent wilderness designations. Any water appropriation that has taken place upstream from the wilderness in the last thirty-five years is invalid. No appropriation of such water in the future may take place, despite the fact that there is no factual basis establishing that the Court=s holding is necessary to fulfill the purposes of the wilderness reservation.

The Court has decided in part IV.A.5. Athat the United States is entitled to the entire amount of unappropriated waters constituting the natural flow in the Wilderness Areas and is not required to quantify in cubic feet per second or acre feet per year the precise amount since the entire amount is necessary to

fulfill Congress=s intent to preserve and protect the unimpaired and natural character of the Wilderness Areas.@ This conclusion is not supported by the words of the statute, the legislative history, Court decisions interpreting the concept of reserved water rights, or any factual record. The Court extends the impact of the Wilderness Act beyond the wilderness into areas that were never intended to be touched by the legislation.

There is no evidence that any purpose of the Wilderness Act has been defeated by appropriations of water upstream from the wilderness. That failure in the record should preclude the Court=s ruling. The absence of evidence as to the amount of water necessary to maintain the character of the wilderness should be sufficient to deny summary judgment, but the Court rewinds the clock and says that from the date of the designation of the wilderness, all water that was unappropriated above the wilderness must be allowed to flow into and through the wilderness. Flood stage waters may rip through the river, but none of that water can be diverted upstream of the wilderness, according to the Court=s opinion. If there is any farmer or rancher that has obtained an appropriated water right upstream of the wilderness after designation of the wilderness, the farmer or rancher must give up the water. If there is any community that has utilized more water upstream of the wilderness than it utilized before creation of the wilderness, that community must surrender the water. The number of people and water rights affected is not established by this record, just as the need to allow all the water to flow into the wilderness is not established. Regardless, if that water is necessary for continued life of the farm or continued life of the community, that life must end. Any river that runs into the wilderness must be left untouched in the future.

In effect the wilderness has been extended far beyond its boundaries, locking into place development as it existed in 1964 and the dates of later designations. The result reached by the Court is this: the Wilderness Act precludes development not only of the wilderness but all property upstream of the wilderness, unless farmers, recreational users, and communities of people can determine ways to exist without water. A photograph taken of the non-wilderness areas at the time of their designations would capture what those parts of the state outside the wilderness areas must look like now and in the future.

The Court relies upon a statement by Senator Hubert Humphrey in 1958, some six years before the passage of the Wilderness Act, to determine that the language of Section 4(d)(6) of the Wilderness Act

Asimply preserved the status quo between the states and federal government with respect to water rights and does not operate as a express disclaimer of federal reserved water rights.@ If Senator Humphrey=s remarks in 1958 are relevant to what was done in 1964, they support the idea that water outside the wilderness area can be appropriated under state law if it does not defeat the purposes of the wilderness. The Senator stated the following:

> When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change existing water laws and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors, it has seemed necessary to insert a short sentence to remove any doubts. The sentence added says: >Nothing in this act shall constitute an express or implied claim or denial on the part of the federal government as to exemption from state water laws.=@

It appears that the Court reads the Senator=s statement to mean that existing water rights are protected, rather than reading it to protect existing water laws. Existing water laws allowed appropriation of water outside the wilderness. That is clearly what Senator Humphrey meant when he sought to allay the fears that the Wilderness Act would deprive local communities of domestic and irrigation water. The Senator was seeking to assure people that development could continue outside the wilderness area, not simply assure them that existing water rights would not be taken away.

A statement by Senator Humphrey in 1963 brings more closely into focus the debate that was occurring with regard to wilderness legislation:

> During the 8 years in which the proposed legislation has been before Congress, many important modifications have been effected in the specific procedures for identifying and protecting certain areas of wilderness. For example, the proposal to establish a permanent national wilderness preservation council has been eliminated. The original definition of a wilderness area has been modified considerably. The regulations for the protection of wilderness areas have been revised and liberalized. Each of these changes was made because the proponents of the legislation were determined to seek a bill that recognized the need for wilderness preservation but which did not unduly hamper present land use programs or legitimate economic, commercial, or commodity uses.

109 Cong.Rec. 5901 (1963) (emphasis added).

This statement by the Senator does not directly address the issue before this Court, but it is clearly indicative of the attitude at work in the passage of the Wilderness Act. The creation of the wilderness was not intended to strangle the economic life from areas outside the wilderness.

Senator Frank Church, a strong supporter of the Wilderness Act, made the following comments in response to statements made during debate:

> Finally, Mr. President, the junior senator from Colorado has argued that the bill constitutes some sort of impairment with respect to the development of water resources within the areas affected by the bill. He has pointed out, quite correctly, the importance of water impoundments-dams, power generators, and reclamation projects to the west. But, Mr. President, I suggest that there are two portions of the bill which adequately assure the west continued water development, and I submit that even within the wilderness system the bill does not constitute any impediment whatever.

109 Cong.Rec. 5892 (April 8, 1963) (emphasis added). Senator Church was speaking of the provisions that would allow the President to authorize some development in a wilderness area and that allow the Federal Power Commission to license water projects within the wilderness. Clearly, Senator Church anticipated that the west would have Acontinued water development@ above and beyond the authority he recognized to exist with the President and the Federal Power Commission. A study of the long history of debate over the Wilderness Act leads ineluctably to the conclusion that Congress could not and would not have passed a bill that stated what the Court says is implied. There was no more important person than Frank Church in the development of wilderness legislation. A review of the Frank Church papers, which are available a few blocks from this Court at Boise State University, brings home the reality that Senator Church would not have advocated and voted for the Wilderness Act but for his understanding that the Act would not cripple the economic growth of portions of Idaho outside the wilderness. The heat of the debate was over the removal from development of land and water resources within the boundaries of the wilderness. The scope of the reserved water right approved by the Court was not contemplated and has not been shown to be necessary to maintain the beneficial features of the wilderness.

Beyond legislative history, a reading of *Cappaert v. United States*, 426 U.S. 128, 143 (1976), makes it clear that the extent of the reservation found by the Court is unsupportable:

> The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. *Arizona v. California*, *supra*, 373 U.S., at 600-601, 83 S.Ct., at 1497-1498, 10 L.Ed.2d, at 578-579. Here the purpose of reserving Devil=s Hole Monument is preservation of the pool. Devil=s Hole was reserved >for the preservation of the unusual features of scenic, scientific, and educational interest.= The Proclamation notes that the pool contains >a peculiar race of desert fish . . . which is found nowhere else in the world= and that the pool >is of . . . outstanding scientific importance . . .=. The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest. The fish are one of the features of scientific interest. The preamble noting the

> scientific interest of the pool follows the preamble describing the fish as unique; the Proclamation must be read in its entirety. Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil=s Hole, thus implementing the stated objectives of the Proclamation.

Idaho has recognized the principles of *Cappaert* in *Avondale Irrigation Dist. v. N. Idaho Prop.*, 99 Idaho 30, 577 P.2d (1978). *Avondale* states that under some circumstances the United States is entitled to the entire natural flow of a stream if necessary to accomplish the purposes of the federal reservation. But that determination is dependent upon necessity:

> If on remand in *Soderman* the United States can prove that the entire natural flow at all times is necessary to accomplish the purposes of the national forest, timber management and watershed protection, then it is entitled to that entire natural flow. However, water which merely contributes to or is helpful in achieving these purposes but the absence of which would not frustrate their accomplishment does not satisfy the test. A strict standard of necessity must be applied in these cases. *Cappaert v. United States, supra*.
>
> Therefore, if on remand it is found by the district court that at any time in the seasonal and yearly variations in stream flows the entire natural flow will exceed the minimum flow necessary to achieve the purposes for which the Caribou National Forest was created, the court must find the necessary minimum flow so that the marginal excess may be available for use and appropriation. In such case, I.C. ' 42-1409 would be appropriately applied to the United States, and it should be required to quantify its water rights in second feet, or acre feet, in order to assure certainty, uniformity and clarity among the water rights of the various users in this state. As with all water litigants, the burden of proving its claim is upon the United States.

Id. at 41 (emphasis added).

Again, there has been no showing in this case that it is necessary to reserve to the wilderness all unappropriated water to maintain the character of the wilderness. This wilderness area is a mass of land with many characteristics -- wildlife, fish, timber and other plant life, minerals, scenic vistas. The purpose of the Wilderness Act is to preserve these characteristics from development. The Court=s decision does not tell us what characteristic is impaired by recognition of the right to appropriate water for beneficial purposes outside the wilderness. Apparently the Court views the water itself as the primary focus of the wilderness. The legislation does not say that. Reserving all naturally flowing water after creation of the

wilderness runs counter to the logic of *Cappaert* which recognized that A[t]he implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.@ *Cappaert* at 143. The Court has turned this principle upside-down and determined that the wilderness is entitled to all of Idaho=s unappropriated water that flows into the wilderness since the date the wilderness was created, whether it is necessary to maintain the essential characteristics of the wilderness or not.

Consistent with *Avondale*, this case should be remanded to the SRBA court for a full exploration of the facts and a determination of the amount of water that must be allowed to flow into the wilderness to fulfill the purposes of the reservation.